

EPA / DOL Memorandum of Understanding: Chemical Accident Investigation

MEMORANDUM OF UNDERSTANDING
between
THE UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
Office of Solid Waste and Emergency Response
Office of Enforcement and Compliance Assurance
and
THE UNITED STATES DEPARTMENT OF LABOR
Occupational Safety and Health Administration
on
Chemical Accident Investigation

I. PURPOSE AND SCOPE

The purpose of this Memorandum of Understanding (MOU) is to set forth the principles of the working relationship between the United States Environmental Protection Agency (EPA) and the United States Department of Labor, Occupational Safety and Health Administration (OSHA) in the area of chemical accident investigation. This MOU establishes policy and general procedures for cooperation and coordination between the two agencies, in order to ensure the most effective possible investigation and reporting of major chemical accidents and to eliminate duplication to the maximum extent possible, and, in recognition of the importance of the public's right to learn the underlying causes of chemical accidents. Specific procedures for chemical accident investigation will be detailed in a joint Accident Investigation Protocol which is currently under development. This MOU implements OSHA's authority under the Occupational Safety and Health Act of 1970 (OSH Act), and EPA's authority under sections 103 and 112 of the Clean Air Act (CAA), and section 104 of the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) to enter into agreements with other federal agencies to further the objectives of Congress and the President.

OSHA and EPA are developing a comprehensive strategy for coordinated enforcement of OSHA's Process Safety Management (PSM) standard and EPA's Risk Management Programs (RMP) rule, and of

OSHA's and EPA's general duty clauses. Consequently, this MOU does not address those requirements in any detail.

II. BACKGROUND AND RESPONSIBILITIES

OSHA is the federal agency with primary responsibility for worker safety and health. The agency is authorized by the OSH Act, 29 U.S.C. 651 et seq., to promulgate and enforce mandatory safety and health standards for the purpose of assuring, so far as possible, safe and healthful working conditions for every worker in the nation. OSHA conducts inspections of workplaces to determine compliance with the OSH Act and with specific OSHA standards. When violations are found, OSHA is authorized to issue citations to employers, propose penalties, and require abatement of hazards. In cases involving imminent dangers, OSHA is authorized to seek injunctive relief in U.S. District Court.

Under section 18 of the OSH Act, states may elect to administer their own occupational safety and health programs, or "State Plans," which must be approved and monitored by federal OSHA. OSHA does not delegate authority to the states, but rather removes the bar of preemption through State Plan approval. OSHA exercises no enforcement authority in these states except in a few areas, such as coverage of federal agencies, offshore maritime facilities, and military bases. Thus, other government agencies must work with the State Plan in the same manner as they do with federal OSHA, because the State Plan is the authority responsible for occupational safety and health enforcement in that state.

The United States Environmental Protection Agency (EPA) is the federal agency with primary responsibility for the protection of public health and the environment. EPA assures compliance with federal environmental statutes and regulations through standard-setting and rulemaking; technical reviews; audits and studies; public hearings; issuance of permits and licenses; investigations; enforcement of environmental laws; and evaluation of operating experience and research. EPA has authority to conduct investigations into chemical accidents under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) section 104(e), and CAA sections 103, 112, 114, and 307.

Pursuant to the authorities described above, the EPA currently has, and will retain in the future, statutory responsibility for

conducting chemical accident investigations. This authority will not be delegated to the states. States may, however, undertake investigations under other authorities. EPA strongly supports the development of state legislation comparable to the accident prevention provisions of the Clean Air Act, and state participation in chemical accident investigations.

Both OSHA and EPA have a responsibility to investigate major chemical accidents to determine whether any violations of their laws occurred and, if so, to require correction of these violations and ensure compliance with their laws. In addition, the Administration asked OSHA and EPA, under their own statutory authorities, to undertake investigations to determine the root cause(s)(1) of chemical accidents and to issue public reports containing recommendations on what government, industry, and other stakeholders could do to prevent similar accidents from occurring in the future. These functions are similar to some of the responsibilities of the Chemical Safety and Hazard Investigation Board created by the Clean Air Act Amendments of 1990.

Much of the information required to meet the objectives of the two agencies is similar. Therefore, it is in the best interests of the government and the public that investigations and information-gathering be conducted in the most efficient and effective manner possible, with minimum duplication of activities.

III. PRINCIPLES OF COORDINATION

There will be the fullest possible cooperation between OSHA and EPA in carrying out accident notification, data and information exchange, training, technical and professional assistance, and related activities to ensure the safety, health, and well-being of the nation's workforce and the general public, and to protect the environment. EPA and OSHA investigators will work with federal On-Scene Coordinators (OSCs) and other responders to ensure that investigation activities do not compromise the protection of public health, the environment, or worker safety and health, and that response activities do not unnecessarily compromise the accident investigation and the enforcement responsibilities of the respective agencies.

EPA and OSHA will coordinate and cooperate with other federal, state, and local investigatory bodies in order to minimize

duplication of effort. Such bodies may include the OSHA State Plans, state environmental agencies, state fire marshals, local law enforcement agencies, and judicial bodies. In the case of transportation-related accidents, OSHA and EPA may cooperate with the National Transportation Safety Board (NTSB) where it has elected to conduct an investigation, although NTSB will retain primary responsibility for investigating the cause of transportation-related accidents.

In recognition of the agencies' statutory authorities and responsibilities described above, the following procedures will be followed with respect to the investigation of major chemical accidents:

A. Notification of Accidental Releases of Chemicals

EPA and OSHA will usually be notified of chemical accidents or releases through the National Response Center (NRC). In addition, EPA will notify OSHA and the NRC of any major chemical accident or release of which it becomes aware through sources other than the NRC. Similarly, OSHA will notify EPA and the NRC of any major chemical accident or release reported by a party other than the NRC. Such notification will be made immediately after one of the agencies has received such a report.

A major chemical accident or release is defined for the purposes of this MOU as one which meets one or more of the following criteria:

1. results in one or more human fatalities;
2. results in the hospitalization of three or more workers or members of the public;
3. causes property damage (on- and/or off-site) initially estimated at \$500,000 or more in total;
4. presents a serious threat to worker health or safety, public health, property, or the environment;
5. has significant off-site consequences, such as large-scale evacuations or protection-in-place actions, closing of major transportation routes, substantial environmental contamination or

substantial effects (e.g., injury, death) on wildlife or domesticated animals; or

6. is an event of significant public concern.

When a major chemical accident occurs, EPA and OSHA will first determine whether they intend to go on-site, and will notify each other of their intent within 24 hours of receiving notification of the accident. If both agencies decide to go on-site, they will jointly determine, once they are both on-site and usually within the first 96 hours following the event, whether the event potentially merits a joint root-cause investigation and issuance of a public report. Until that decision is made, the agencies will act under the presumption that a joint investigation is being conducted. Not all events meeting the definition of major chemical accident as delineated above will be jointly investigated or will result in the issuance of a joint public report. In general, OSHA and EPA will select for joint investigation those events at which both agencies are present under their separate statutory responsibilities and which present the opportunity to learn and/or disseminate important lessons about chemical accident prevention. If one Agency elects not to investigate a chemical accident the other agency reserves the right to conduct an independent investigation and issue an independent report (the investigating agency may request technical assistance from the other agency). In any case, EPA and OSHA do not intend to conduct separate root-cause investigations and issue separate root-cause investigation reports on the same accident.

B. Investigation of Accidents

EPA and OSHA will each maintain a core team of chemical accident investigators directed by each agency's headquarters. These accident investigation teams will organize and coordinate the agencies' initial response to major chemical accidents. They will also ensure that OSHA and EPA investigation efforts are coordinated with the On-Scene Coordinator, the State Emergency Response Commission(s), the Local Emergency Planning Committee(s), responding Regional Response Team agencies, and other responding entities (e.g., corporate investigators, insurance companies, unions, state and local governments). This includes promptly establishing procedures for gaining access to evidence in cases where other entities (e.g., state and local criminal investigatory

agencies, NTSB) have precedence in retaining evidence.

EPA and OSHA will develop and share assignment plans for headquarters, regional, area office, and state staff who will participate on the accident investigation teams. This will facilitate prompt contacts among the parties and provide a measure of predictability concerning who will be available at what times in each agency. The accident investigation team will be co-led by EPA and OSHA, and both agencies, recognizing the importance of each other's compliance investigations, will support each other's efforts to meet enforcement responsibilities. In the event of a dispute between EPA and OSHA lead investigators, the matter will be promptly referred to the appropriate individuals in the agencies' headquarters for resolution.

In addition to looking for the root cause(s) of the accident, OSHA and EPA will be investigating to determine compliance with their respective regulations. Because OSHA has a statutory deadline for issuing citations, one of OSHA's primary goals during the first six months following an accident will be to determine if any violations of the OSH Act or OSHA regulations occurred. OSHA and EPA compliance investigators may or may not be the same personnel who conduct the root-cause investigation; however, compliance and enforcement activities will be coordinated with the accident investigation activities. Specific procedures for such coordination will be contained in the Accident Investigation Protocol.

This MOU is not intended to, and does not, affect or govern any federal criminal investigation, whether such criminal investigation is conducted by EPA, OSHA, or another federal law enforcement agency. In the event that the potential for criminal case development exists related to a particular accident, OSHA and EPA will coordinate with each other on a case-by-case basis to ensure the maximum cooperation with criminal investigators.

C. Information and Data Sharing

OSHA and EPA will share any records, reports, data, or information obtained by their investigators, subject to applicable law and privileges. The two agencies may make joint requests for information. Neither agency will enter into any settlement agreement with any employer or potentially responsible party that would compromise the sharing of information between the agencies or

the use of information that may be lawfully disclosed in the development of a public report. Both agencies will have access to all factual data gathered by either agency, and will collaborate on determining causation and on developing recommendations to enhance chemical safety.

Employees who participate in an accident investigation will be provided protection under section 11(c) of the OSH Act from discrimination or reprisal for filing reports of unsafe or unhealthful working conditions. In addition, employees involved in accident investigations are entitled to protection from discrimination pursuant to CAA section 322 and CERCLA section 110. These provisions are administered by the Department of Labor. In particular, OSHA and EPA may remove personal identifiers from their investigative files before releasing them in order to protect witness confidentiality.

Each agency will be responsible for the public release of its documents and for maintaining the information which it has collected. Each agency will respond to requests for disclosure of material originated by the other agency only after consultation between the agencies, and will apply disclosure criteria (e.g., CBI, trade secret, enforcement-sensitive, FOIA) which would have been applicable had the material been requested from the originating agency.

OSHA and EPA recognize the importance of sharing information with the public to the extent possible during the investigation and will work out procedures for doing so in the Accident Investigation Protocol.

D. Training, Technical and Professional Assistance

EPA and OSHA will make their chemical accident and related training programs available to each agency's personnel, as well as to OSHA State Plan personnel. OSHA and EPA will provide technical and professional assistance to each other during chemical accident investigations upon request and as resources permit.

E. Joint Accident Investigation Reports

The product of joint on-scene accident investigations will be a public report containing at least the following:

1. a description of the accident;
2. a description of the response to the accident (may be done by reference to another official report);
3. observations and findings;
4. laboratory test results, if applicable;
5. discussion of the probable root cause(s) of and contributing factors to the accident;
6. further planned activities, where appropriate; and
7. recommendations for enhancing chemical safety, emergency preparedness, and prevention of chemical accidents (both facility-specific and industry-wide).

Investigation reports resulting from joint accident investigations will not be finalized until all issues and comments are resolved to the satisfaction of both agencies.

Final versions of major joint investigation reports may then be reviewed by independent experts in order to assess the scope, approaches, and methods used in the reports. The results of such reviews will be used to guide and improve future studies, investigations and reports. The two agencies will consult upon review mechanisms. The results of reviews and the agencies' written responses will be made available to the public. An investigation report may be amended or supplemented after review, if both agencies agree that it is necessary. Any issues or comments will be resolved to the satisfaction of both EPA and OSHA before any revision or supplement is finalized, taking into account the public's interest in learning the underlying causes of chemical accidents through public reports.

F. Independent Accident Investigation Reports

In the interest of consistency and to ensure the maximum utility of reports prepared by a single agency, EPA and OSHA will each provide the other with an opportunity to review and comment on any investigative report determining causation or making recommendations before such report becomes final. In order to

protect the integrity of the investigation, and the confidentiality of internal deliberative processes, such review will be in confidence, and the draft report will not be released to or discussed with anyone outside the agencies, consistent with applicable law. Review privileges will be granted for all accident investigation reports which arise from major chemical accidents which either agency investigated.

IV. OSHA STATE PLANS

A. Background

OSHA-approved State Plans operate under authority of state law. State standards, interpretations, regulations, and policies are adopted under state occupational safety and health acts and state law, and are required to be "at least as effective" as federal equivalents. State freedom of information policies are also governed by state law.

There are currently 23 approved State Plans that cover both public and private employment sectors. (Two additional State Plans cover public employees only.) OSHA has suspended or relinquished its concurrent enforcement authority in 22 of the states with OSHA-approved State Plans. All 23 State Plans have adopted a Process Safety Management standard which is identical to or at least as effective as the federal standard.

B. State Supplemental Agreements

For most chemical accident investigations covered by this MOU and occurring in states with OSHA-approved State Plans, the state occupational safety and health agency has primary enforcement authority and jurisdiction. EPA will work with the State Plan officials in the same manner as with federal OSHA officials.

OSHA will ask each State Plan to establish a point of contact concerning chemical accidents, and will make the resources of its accident investigation team available to the State Plans. State experts may be asked to participate on the team.

EPA will negotiate individual supplemental agreements with each of the State Plans, incorporating the terms of this MOU to the extent possible, and addressing state-specific issues of coordination and

law. The appropriate OSHA Regional Administrator will facilitate the negotiations and countersign the resulting agreement. It is EPA's goal to negotiate supplemental agreements with the states by the end of FY 1997.

V. RESOURCES

The resource requirements of joint accident investigation and report writing responsibilities arising from this agreement could not be accurately estimated at the time the agreement was executed. Therefore, both agencies will reexamine resource requirements at the end of the first 12 months following the signing of this agreement, and make whatever adjustments may be necessary to ensure the continued, effective exchange of resources pursuant to the fulfillment of this agreement.

VI. PERIOD OF AGREEMENT

This MOU shall continue in effect unless modified in writing by mutual consent of both parties or terminated by either party upon 30 days' advance written notice to the other.

It is expressly understood that this MOU will need to be reexamined and may be modified or superseded once full compliance with EPA's rule on Risk Management Programs is required, in June 1999.

This MOU does not preclude either agency from entering into separate agreements setting forth procedures for other programs which can be addressed more efficiently and expeditiously by special agreement.

VII. IMPLEMENTATION

Nothing in this agreement is intended to diminish or otherwise affect the authority of either agency to implement its respective statutory functions, nor is it intended to create any right or benefit, substantive or procedural, enforceable at law by a party against the United States, its agencies, its officers, or any other person. This agreement is effective upon signature by both parties.

U.S. Environmental Protection Agency

Office of Enforcement and Compliance Assurance

Steven A. Herman
Assistant Administrator

Date: _____

U.S. Environmental Protection Agency
Office of Solid Waste and Emergency Response

Elliott P. Laws
Assistant Administrator

Date: _____

U.S. Department of Labor
Occupational Safety & Health Administration

Joseph A. Dear
Assistant Secretary

Date: _____

1. Root causes are the underlying prime reasons, such as failure of particular management systems,
that allow faulty design, inadequate training, or deficiencies in maintenance, which in turn lead to an
unsafe act or condition and result in an accident.

Disclaimer

This electronic file has been retyped to make it available to you in electronic form. Formatting (margins, page numbering, etc.) may differ from the original hard copy to make the document more easily readable on your computer screen. If any discrepancies are found, the file copy (hard copy original) which resides at the U.S. EPA provides the official policy. Information on the file copy may be obtained from the Air Enforcement Division, Stationary Source Program at (202) 564-2414.